
(2019) 09 GAU CK 0015

In the Gauhati High Court

Case No : Criminal Revision Petition No. 271 Of 2014

Debajani Kalita Deka

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 06-09-2019

Acts Referred:

Negotiable Instruments Act, 1881 — Section 20, 87, 118, 138, 139
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 09 GAU CK 0015

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : R Sarma, S K Jain

Final Decision : Dismissed

Judgement

1. Heard Mr. R. Sarma, learned counsel appearing for the petitioner as well as Mr. S. K. Jain, learned counsel representing the respondent.

2. By way of this revision, the petitioner has challenged the impugned judgment and order dated 31.05.2014, passed by the learned Appellate Court of Addl. Sessions Judge, (FTC) No.4, Kamrup (M), in Criminal Appeal No.30/12, whereby the learned Appellate Court has affirmed the order of learned trial Court of the Sub-Divisional Judicial Magistrate (S), No.II, Kamrup (M) and passed in C.R. Case No.2816C/2008, u/s.138 of the N.I. Act.

3. Briefly stated the case of the petitioner is that complainant/respondent Sunil Kumar Singh filed a complaint against the petitioner Debajani Kalita Deka with the allegation that the present accused/petitioner, out of financial crisis, took a loan from the complainant amounting to Rs.1,35,000/- (Rupees one lakh, thirty five thousand) on oral agreement with an undertaking to repay the same. Subsequently in discharge of the liabilities, the accused issued a cheque amounting to Rs.1,35,000/- on 26.03.2008 and on presentation of the cheque in the bank, the cheque was dishonoured with remark 'account closed'. The

complainant issued a legal notice demanding the amount within 15 days of the receipt of the notice but as it was not responded, the complaint was filed under Section 138 N.I. Act.

4. On appearance of the accused person, the particulars of the offence u/s.138 of the N.I. Act were read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

5. During the trial, the complainant examined two witnesses in support of the case and also exhibited some documents. The accused person was examined u/s.313 CrPC wherein the accused denied the allegation. Defence, however, adduced one witness.

6. The learned trial Court, after hearing the argument of both the parties, found and hold the accused guilty and convicted him under Section 138 N.I. Act and sentenced him to S.I. for one month and to pay a compensation of Rs.1,50,000/- (Rupees one lakh, fifty thousand).

7. On appeal so preferred by the accused/petitioner, the same was dismissed and the order of the trial Court was, however, modified to the extent that accused/petitioner is sentenced to imprisonment till rising of the court in addition to the amount of compensation of Rs.1,50,000/- awarded by the court below with a direction to appear before the trial court to start the sentence and pay the compensation.

8. After losing in two forums, the accused/petitioner has preferred the present revision petition challenging the impugned judgment and order passed by the learned Appellate Court in Criminal Appeal No.30/12, contending inter alia that the court below has erred in law as well as in fact while passing the impugned judgment, that the learned Court below has failed to appreciate the relevant provision of law u/s.138(a)/(b) and 142(a)/(b) of the N.I. Act, that the learned court below has misread and miss-appreciate the evidence on records and came into a erroneous decision, which has resulted in miscarriage of justice.

9. The learned counsel Mr. R. Sarma, appearing on behalf of the petitioner, has submitted that the petitioner herein has not issued the cheque in discharge of any liability whereas the petitioner has taken a loan of Rs.50,000/- from Smti. Sabita Deka and thus repaid the principal amount in addition to Rs.60,000/- as interest in one year. That apart, the complainant has taken away her Activa scooter of her husband forcefully without any reason. Further, it is contended that cheque was obtained from the accused/petitioner forcefully by the complainant while she specifically stated that she has no such amount in her account and the learned trial court as well as the Appellate Court has failed to appreciate the matter.

10. The learned counsel for the respondent Mr. Jain has refuted such contentions of the learned counsel for the petitioner on the ground that as there is no denial of issuance of cheque so the complainant/respondent is the holder of cheque in

due course and there is no rebuttal evidence. It is contended that in order to substantiate her case, the petitioner should have adduce proper evidence regarding repayment of her loan taken by her and also about forceful taking of the cheque from the petitioner but the same was not adhered to.

11. Due consideration is given to the argument advanced before this Court and also gone through the matters on record.

12. So far as the evidence of the complainant/respondent is concerned, he has specifically stated that the aforesaid cheque was issued against the loan of Rs.1,35,000/- taken by the accused person and on presentation of the cheque before the bank concerned, same was dishonoured. In this respect, he has also produced and exhibited the relevant cheque, cheque return memo, legal notice, postal receipt and the documents through which demand notice was sent vide Ext.1 to Ext.5. By way of cross-examination it has been suggested that an amount of Rs.70,000/- was taken on loan out of which Rs.40,000/- was paid as interest and for remaining Rs.30,000/-, the accused/petitioner forcefully took a blank cheque from the complainant. It was suggested that although the cheque bears the signature of the complainant but the remaining portion was not written by her and it was filled up and written by the accused herself. A certain document vide Ext.B was shown to the complainant stated to have written by the accused regarding the finance which is not specific as regard its content.

13. The bank official/PW2 has proved that the cheque in question was issued by the accused person and the same was dishonoured while presented as the account was closed. Vide Ext.2 is the cheque return memo. It is to be noted in her statement under Section 313 Cr. P.C. the accused has stated that the amount she has taken on loan was returned with interest but the accused/petitioner forcefully obtained the cheque from her.

14. As against the plea taken by the accused/petitioner that the cheque was obtained by the complainant forcefully and that she has already repaid the loan taken by her, no evidence was adduced by her. The accused/petitioner neither affectively made any cross-examination nor any positive evidence is adduced by her by appearing in the witness box, to rebut the case of the complainant. The only witness that was examined by the accused was her sister who has simply stated that the complainant along with others have forcefully taken away the cheque whereas her sister stated that she has no such amount in her account and her sister went to police to inform the matter and the scooter also not returned. In her cross-examination she has stated that they were not given a chance to lodge the FIR regarding forceful conduct of the complainant neither she could prove any FIR that was filed for taking away the scooter. She has admitted that news was published against the accused person for misappropriation of the amount of the society.

15. The evidence on record itself is apparent that the petitioner admitted about the issuance of cheque by her but denied her liability. She has also pleaded that

the amount of loan taken by her was repaid with interest and such cheque was obtained forcefully and the scooter of her husband was also taken away forcefully by the accused against the interest of the loan, and all these are matter of facts required to be proved by way of adducing evidence. But except giving suggestions to the witnesses and even by adducing evidence of one witness who has not uttered anything about such loan repayment etc., the accused/petitioner failed to rebut the case of the complainant in due manner. Before the trial court, several pleas were taken like non-service of demand notice and theft of the scooter towards interest etc. but same was not challenged properly in course of evidence, hence, it bears no consequence.

16. Further it is noted that the accused/petitioner did not file any FIR before police or any other proper authority for such forceful taking of cheque in question and the scooter from their possession and the same also remained disproved. While it is the plea of the accused/petitioner that she has repaid the loan taken by her and cheque was also taken forcefully towards remaining amount of interest of loan, it was incumbent on her part to substantiate the same by way of proper evidence by herself, which is not found in this case. The defence evidence adduced by her is not at all enough to rebut the presumption under the law. In the circumstances, the learned trial court has rightly raised the statutory presumption under Section 139 of N.I. Act. Under Section 118/139 of the N.I. Act the court is to draw presumption that the holder of cheque is a holder in due course obtained from this lawful owner and unless contrary is proved that the holder of cheque received the cheque of the nature referred to Section 138 for discharge, in whole or in part of any debt and liability. It will be appropriate to refer the observation of the Hon'ble Supreme Court in *Bir Singh vs Mukesh Kumar*, (2019) 106 SCC 923 and *Hiten P. Dalal vs Batindra Nath Banerjee* (2001) 6 SCC 16.

The observation in the case of *Bir Singh* (supra) is quoted below:-

"21. In passing the impugned judgment and order dated 21-11- 2017, the High Court mis-construed Section 139 of Negotiable Instruments Act, which mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. Needless to mention that the presumption contemplated under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.

22. In *Hiten P. Dalal vs. Bratindranath Banerjee* (2001) 6 SCC 16, this Court held that both Section 138 and 139 require that the Court shall presume the liability of the drawer of the cheques for the amounts for which the cheques are drawn. Following the judgment of this Court in *State of Madras vs. Vaidyanatha Iyer*, AIR 1958 SC 61, this Court held that it was obligatory on the Court to raise this presumption.

23. Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces evidence showing the reasonable possibility of the nonexistence of the presumed fact as held in Hiten P. Dalal (supra)."

(para 24-35 are not relevant)

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"36. The proposition of law which emerges from the judgments referred to above is that the onus to rebut the presumption under Section 139 that the cheque has been issued in discharge of a debt or liability is on the accused and the fact that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act.

37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence".

17. In Hiten P. Dalal (supra), it has been held that it is obligatory on the part of the Court to raise the presumption 138 and 139 of NI Act in every case where the factual basis for raising of the presumption has been established. Both the sections 138 and 139 required that Court shall presume the liability of the drawer of the cheque for the amount for which the cheque were drawn. It introduces an exception to the general rule as to the burden of prove in criminal cases and shift the onus to the accused. Such a presumption is a presumption of law as distinguished from a presumption of facts which describes provision by which the Court may presume certain State of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence because by the letter all that it means is that prosecution is obliged to prove the case beyond reasonable doubt. The obligation of prosecution may be discharged with the help of presumption of law or facts unless the accused adduced evidence showing the reasonable possibility of non existence of presume facts.

18. So far as regard the service of notice, in D. Vinod Chivappa vs Nanda Belliappa, (2006) 6 SCC 456 and in (2015) 1 LW (Crl.) 720, M/s Jayalakshmi Textile vs S.K. Kolandasamay, it has been held that when notice is sent by registered post correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause-(b) of the provision to Section 138 N.I. Act stands complied with. Needless to emphasize that the complaint must contain basic fact regarding the mode and manner of issuance of notice to the drawer of the cheque.

19. As in the present case the accused/petitioner has failed to rebut the statutory presumption raised in favour of the holder of the cheque in due course as has been discussed above, save and except raising the plea of denial, which holds no water. There appears no illegality and perversity in findings of the court below to interfere into. However, considering entirety of the matter while maintaining the conviction, the sentence is modified. The accused/petitioner is hereby sentenced to pay a fine of Rs.1,50,000/- (Rupees one lakh, fifty thousand), in default S.I. for 6 (six) months. The amount of fine be provided to the complainant/respondent as compensation. The petitioner will deposit such amount before the trial court within a period of 2 (two) months from the day of order.

20. The revision petition stands dismissed accordingly.

21. Return back the LCR along with a copy of this judgment.